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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/700,355	11/03/2003	Jackson Streeter	ACULSR.028A	5229

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KNOBBE MARTENS OLSON & BEAR LLP
2040 MAIN STREET
FOURTEENTH FLOOR
IRVINE, CA 92614

EXAMINER

KIM, TAEYOON

ART UNIT	PAPER NUMBER
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1651

NOTIFICATION DATE	DELIVERY MODE
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07/13/2007

ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

jcartee@kmob.com
eOAPilot@kmob.com

Advisory Action Before the Filing of an Appeal Brief	Application No. 10/700,355	Applicant(s) STREETER, JACKSON	
	Examiner Taeyoon Kim	Art Unit 1651	

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 22 June 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☐ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: _____.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

Continuation of 11. does NOT place the application in condition for allowance because:

Applicant's argument filed on 6/22/07 is based on the assertion that Salinsky et al. teach in vivo application of the method rather than in vitro application for cells in culture. Applicant further argues, citing the disclosure of Salinsky et al. (column 2, lines 38-41), that because of the difference between in vivo and in vitro situations, a person of ordinary skill in the art would not expect success in using the parameters set for in vivo application of the method utilizing electromagnetic energy in in vitro application as in the current invention.

This argument is not persuasive because Salinsky et al. clearly teach the method of exposing cells in culture using electromagnetic energy, and the data derived from such in vitro experiments would be applied to in vivo application. Although the parameters may not be identical between in vivo and in vitro applications as applicant argued, the reference teaches the method used in in vitro experiments and it would have been obvious for a person of ordinary skill in the art to routinely modify such parameters.

It is well known in the art that in vitro experimental data would provide a basis for in vivo application as discussed in the previous final action. For such reason, the range of parameters listed for in vivo application of the method in Salinsky et al. would be derived from in vitro experimentations as shown in Fig. 1. For in vitro experimentation, a person of ordinary skill in the art would have been motivated to optimize parameters involved in the method of treating cells with electromagnetic energy to activate proliferation of such cells, and would have recognized that those parameters would be result effective variables. As such, the variables would be routinely optimized by one of ordinary skill in the art in practicing the invention disclosed by those references. Generally, differences in concentration will not support the patentability of subject matter encompassed by the prior art unless there is evidence indicating such concentration is critical. "[W]here the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation." In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 CCPA 1955 (Claimed process which was performed at a temperature between 40°C and 80°C and an acid concentration between 25% and 70% was held to be prima facie obvious over a reference process which differed from the claims only in that the reference process was performed at a temperature of 100°C and an acid concentration of 10%.); >see also Peterson, 315 F.3d at 1330, 65 USPQ2d at 1382 ("The normal desire of scientists or artisans to improve upon what is already generally known provides the motivation to determine where in a disclosed set of percentage ranges is the optimum combination of percentages."); ** In re Hoeschele, 406 F.2d 1403, 160 USPQ 809 (CCPA 1969) (Claimed elastomeric polyurethanes which fell within the broad scope of the references were held to be unpatentable thereover because, among other reasons, there was no evidence of the criticality of the claimed ranges of molecular weight or molar proportions.). For more recent cases applying this principle, see Merck & Co. Inc. v. Biocrraft Laboratories Inc., 874 F.2d 804, 10 USPQ2d 1843 (Fed. Cir.), cert. denied, 493 U.S. 975 (1989); In re Kulling, 897 F.2d 1147, 14 USPQ2d 1056 (Fed. Cir. 1990); and In re Geisler, 116 F.3d 1465, 43 USPQ2d 1362 (Fed. Cir. 1997). Accordingly, the claimed invention was prima facie obvious to one of ordinary skill in the art at the time the invention was made especially in the absence of evidence to the contrary.

Applicant argued that the reference of van Breugel et al. does not render the claims obvious because van Breugel et al. do not particularly teach a wavelength at 780 nm to 840 nm disclosed in the current invention. Applicant further argued that the wavelength of the current invention is not the peak wavelength required by the method of van Breugel et al. and therefore, a person of ordinary skill in the art would not expect such wavelength ranges for optimization for human fibroblasts. The examiner agrees that the range of wavelength given in the instant invention does not fall into the peak specifically for human fibroblasts taught by van Breugel et al. However, it would have been obvious for a person of ordinary skill in the art to modify such result effective variables for cell types other than human fibroblasts, and a person of ordinary skill in the art would have been tried different wavelength including the range of 780 to 840 nm for other types of cells. Therefore, the invention as a whole would have been prima facie obvious to a person of ordinary skill at the time the invention was made.

Therefore, applicant arguments filed on 6/22/07 does not place the current application in condition for allowance.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Taeyoon Kim whose telephone number is 571-272-9041. The examiner can normally be reached on 8:00 am - 4:30 pm ET (Mon-Fri). If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000

Taeyoon Kim
Assistant examiner
AU 1651

Leon B. Lankford, Jr.
Primary Examiner
AU 1651